(1) 89-429

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE INTERNATIONAL COMMERCIAL BANK OF CHINA,

Petitioner,

— VS. —

NATIONAL BANK OF PAKISTAN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT, STATE OF NEW YORK, APPELLATE DIVISION, FIRST JUDICIAL DEPARTMENT

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QUESTIONS PRESENTED

1. Are the provisions of the Taiwan Relations Act (22 U.S.C.A. § 3301, *et seq.*)("TRA"), which Congress expressly found "necessary" to enact to "help maintain peace, security, and stability in the Western Pacific" and "to promote the foreign policy of the United States" in light of the President's termination of governmental relations with the Republic of China ("ROC"), ineffective because the President announced prior to the effective date of the TRA that the United States would recognize the People's Republic of China ("PRC")?

2. Under the foreign relations law of the United States, does the change in recognition by the United States from the ROC to the PRC set at naught the legal consequences of prior transactions of the ROC in the United States and judgments obtained here by it during the many years it was the only government of China recognized by the United States?

3. As to assets having situs in the United States, are the federal Foreign Assets Control ("FAC") regulations, prohibiting and rendering void any assignment of such assets in which a designated country or an entity thereof claims an interest, ineffective if the assignment of such assets is made and includes assets outside the United States?

4. Under the foreign relations law of the United States, is the act of state doctrine applicable to judicial review of an assignment, made overseas by a sovereign, of assets having situs in the United States so that the assignment may not be reviewed by courts in the United States even though an assignment of such assets is prohibited and made void by United States law?

PARTIES TO THE PROCEEDINGS BELOW

National Bank of Pakistan was the plaintiff below. The International Bank of China was the defendant below. Within the meaning of Rule 28.1, there are no parent companies, subsidiaries or affiliates of either party and there were no other parties to the proceedings below.

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The petitioner, The International Commercial Bank of China ("ICBC"), respectfully prays that a writ of certiorari issue to review the decision and order of the Appellate Division of the Supreme Court, First Judicial Department, State of New York, entered in this case.

OPINIONS BELOW

The Appellate Division of the Supreme Court, First Judicial Department, State of New York, unanimously affirmed, without opinion, the decision of the Supreme Court, New York County, granting respondent's motion for summary judgment and denying petitioner's cross-motion therefor. The Court of Appeals denied permission to appeal. The decisions of the Court of Appeals and the Appellate Division are reported as Table Decisions at 74 N.Y.2d 606, 543 N.Y.S.2d 389 and 147 A.D.2d 994, 537 N.Y.S.2d 941, respectively. The decision of the court of first instance was reported in full in the New York Law Journal, 199(70) N.Y.L.J. (4-13-88) 11 col. 2, but is not officially reported.

JURISDICTION

On February 2, 1989, the Appellate Division, First Judicial Department, unanimously affirmed, without opinion (A-8), the decision and order of the Supreme Court, dated March 29, 1988 (A-9-18). The order of affirmance was not appealable as of right. On March 13, 1989, petitioner filed a motion with the Court of Appeals for permission to appeal therefrom pursuant to CPLR § 5513(b) and Rule 2103(b)(2) and on June 15, 1989, said motion was denied by the Court of Appeals (A-19). A final judgment was entered on July 25, 1989 (A-20-21). This petition for certiorari was filed within 90 days of the date the Court of Appeals denied permission to appeal. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS, REGULATIONS AND FEDERAL DOCTRINES INVOLVED

1. Taiwan Relations Act. The Taiwan Relations Act, 22 U.S.C. §§ 3301 *et seq.* (pertinent provisions set forth in Appendix A at A-1, 2).

2. The Foreign Relations Doctrine of the United States Limiting the Effect That May Be Given To A Change In Recognition. This Court most recently reiterated this doctrine of federal law in *Guaranty Trust Co. of New York v. The United States*, 304 U.S. 126 (1938), in these words:

> . . . If those transactions [based on a prior recognition policy], valid when entered into, were to be disregarded after the later recognition of a successor government, recognition would be but an idle ceremony, yielding none of the advantages of established diplomatic relations in enabling business transactions to proceed, and affording no protection to our own nationals in carrying them on.
>
> So far as we are advised no court has sanctioned such a doctrine. The notion that the judgment in suits maintained by the representative of the Provisional Government would not be conclusive upon all successor governments, was considered and rejected in *Russian Government vs. Lehigh Valley R.C., supra*. . . .We conclude that the recognition of the Soviet Government left unaffected those legal consequences of the previous recognition of the Provisional Government and its representatives, which attached to action taken here prior to the later recognition.

304 U.S. at 140-141.

3. Foreign Asset Control Regulations, issued by the Secretary of the Treasury acting pursuant to § 5(b) of the Trading With The Enemy Act, 50 U.S.C. App. § 59(b)(1980) and Executive Order 9193, in effect from December 17, 1950, until January 31, 1980. In particular, 31 C.F.R. § 500.201; 31 C.F.R. § 500.203(a); 31 C.F.R. § 500.302; 31 C.F.R. § 500.310; 31 C.F.R. § 500.311; 31 C.F.R. § 500.314; 31 C.F.R. § 500.402 (set forth at Appendix B).

4. The Scope of the Act of State Doctrine. The scope of the act of state doctrine was most recently restated in *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 661 (2nd Cir. 1988), with its limitations, as follows:

> The rationale, however, does not extend to property located within the United States. When another state attempts to seize property held here, our jurisdiction

> is paramount. Conversely, the foreign sovereign is acting beyond *its* enforcement capacity when it involves itself within our nation's jurisdiction. The act of state doctrine, accordingly, does not apply, and we may look to our own laws to determine the reach of the foreign sovereign's proscriptions. [Citations omitted] Only acts that are consistent with this nation's policies will be given effect within our borders. Restatement (Second) of Foreign Relations Law § 43 (1965). *See* Restatement (Third) of Foreign Relations Law § 443 comment b (1987).

Bandes, 852 F.2d at 666-67.

STATEMENT OF THE CASE

Legal Aspects of the Case

Plaintiff National Bank of Pakistan ("NBP") sues as assignee to obtain funds having situs in the United States under an assignment from the PRC. The assignment was made in 1971 when Foreign Asset Control ("FAC") regulations prohibited and made null and void any assignment of such assets by the PRC and also prohibited any subsequent validation of a void assignment. The FAC regulations also "blocked" any transfer of assets in this country in which the PRC claimed an interest. The United States recognized the PRC effective January 1, 1979. The "blocking" regulations were lifted in 1980 and NBP then brought suit against ICBC upon the 1971 PRC assignment. The FAC regulations aside, ICBC maintained that the funds always belonged to it and that the PRC never had any rights therein to assign.

Both sides moved for summary judgment and all of the federal questions were presented and determined on these motions (A-9-18). The court held that the TRA was ineffective in preserving any rights of Taiwan[1] existing prior to the change in recognition because, before Congress made the TRA effective, the

[1] "Taiwan" is used herein as defined in § 3314(2) of the TRA (A-2) and includes ICBC as well as the ROC.

President had announced that the United States would recognize the PRC as the sole legal government of China (A-10, 17). The court rejected ICBC's contention that its right to the funds at issue, as well as all other assets of the Bank of China in the United States, is guaranteed by the TRA, which preserves Taiwan's pre-existing rights and ownership of property despite the change in recognition from ROC.

The TRA aside, the court refused to follow the prior decisions of this Court under which the change in recognition could not be given the effect of divesting pre-existing rights in property in this country (A-17).

The court also rejected ICBC's contention that a prior judgment in litigation of the same issues between ICBC and NBP's assignor in a United States court was conclusive. The court below held, in clear conflict with decisions of this Court, that the subsequent change in recognition from the ROC to the PRC permitted the court to make a determination contrary to the prior judgment as to corporate authority and the ownership of assets in the United States (A-16-17).

Further, the court rejected ICBC's contention that the FAC regulations rendered the 1971 PRC assignment to NBP void. It held these regulations to be ineffective as to the assets at issue, which have situs in the United States, because the bulk of the assets included in the assignment were located outside the United States and the assignment itself had been made outside the United States (A-14-15).

Finally, the court accepted NBP's contention that the act of state doctrine applied to the assignment and held that the doctrine "compels the conclusion that the courts of this country are without jurisdiction" to declare that the assignment was null and void as to the assets in the United States, although the federal regulations so provided (A-15).

Factual Statement of the Case

ICBC is a banking corporation with its head office in Taiwan (R-537).[2] The banking entity now known as ICBC was first incorporated under the laws of the Republic of China in 1912, under the name Bank of China (R-485). In 1971 the Bank of China changed its name to International Commercial Bank of China (R-340, 485).

Historically, Bank of China maintained branch offices throughout the world, including branch offices in Karachi and Chittagong, Pakistan. From time to time there were transactions entered into by the New York agency on behalf of various branches, including the Karachi and Chittagong branches. All transactions between the agency and the branches were on behalf of and subject to the control of the head office of the corporate banking entity, Bank of China (R-215, 444-46). NBP's complaint alleges that prior to December 17, 1950, the Karachi and Chittagong branch offices of Bank of China had "deposit accounts" in the Bank of China's New York agency in the respective sums of $546,123.20 and $96,252.18 (R-22). It is these accounts which are the subject of the PRC assignment and this suit.

When, in 1949, the armies of the PRC occupied mainland China, the head office of the Bank of China was moved with the Nationalist Government from city to city, eventually ending up in Taipei, Taiwan. *Bank of China v. Wells Fargo Bank and Union Trust Co.*, 209 F.2d 467, 475 (9th Cir. 1953). Shortly thereafter directives were issued to prevent any transfers of funds being made to that part of the Bank of China that might come under control of the PRC (R-269, 479-81). *See Bank of China v. Wells Fargo Bank & Union Trust Co.*, 92 F. Supp. 920, 921 (N.D. Cal. 1950).

As a practical matter the military occupation of mainland China in 1949 by the PRC gave the PRC the opportunity to take

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[2] Parenthetical citations beginning with "R" refer to the Record on Appeal before the New York Supreme Court, Appellate Division, First Department, which will be filed with the Court pursuant to Rule 19.

over the branches of the Bank of China located on mainland China. *See* 92 F. Supp. at 921-22. The subsequent division of the Bank of China into two separate operations – ICBC (as renamed in 1971) controlled by the ROC and the other controlled by the PRC ("BOC-PRC") – led to the inevitable conflict over ownership and control of pre-revolutionary Bank of China assets. From 1950 to 1952 the disputants litigated the issue of which government, the PRC or the ROC, controlled and had authority to act under the law of United States as to the corporate banking entity known as Bank of China and to own and manage its assets in the United States. *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59 (N.D. Cal. 1952) ("Wells Fargo").[3] In essence, the court held that the PRC was a stranger to the corporate banking entity, Bank of China. The court found "the Nationalist Government of China [ROC] as legally entitled to exercise the controlling corporate authority of the Bank of China" as to the assets located in the United States. 104 F. Supp. at 66. The particular funds at issue in *Wells Fargo* consisted of deposits made with the Wells Fargo Bank by the mainland Head Office of Bank of China as well as deposits by the New York agency, and the Hong Kong, Tientsin (mainland China) and Tsingao (mainland China) branches of Bank of China.[4]

The court below held that it was not bound by the 1952 decision despite § 3033(b)(3)(B) of the TRA, which provides that the preservation of "Taiwan's" rights shall be "[f]or all purposes" and

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[3] There are four reported decisions concerning the *Wells Fargo* litigation, two by the district court and two by the Court of Appeals, each of which casts light on the issue litigated and shows it to be identical with the issue in this case. *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 92 F. Supp. 920 (N.D. Cal. 1950), *appeal dismissed and remanded*, 190 F.2d 1010 (9th Cir. 1951), *on remand*, 104 F. Supp. 59 (1952), *aff'd in part and rev'd in part*, 209 F.2d 467 (1953) (awarding interest on the judgment against Wells Fargo Bank).

[4] Neither *Wells Fargo* nor this case is concerned with assets of Bank of China not having situs in United States nor the status of those assets or the status of BOC-PRC under the law of Pakistan or the laws of any country other than the United States.

expressly includes "actions in any court in the United States." The court held that the guarantee of pre-recognition rights contained in the TRA was ineffective because the TRA took effect two weeks after the President announced that the United States *would* recognize the PRC (A-10, 17). Instead, it held that the 1979 change in the recognition policy of the United States provided the basis for it to divest Taiwan of its legal entitlement, which had existed before 1948 and had been judicially determined in 1952 in *Wells Fargo*, saying:

> The key factor relied upon in *Wells Fargo* was our nation's diplomatic recognition of the ROC to the exclusion of the PRC. *Since the decision* was rendered, however, *our government has recognized the PRC* and has repealed the regulations pursuant to which the PRC was declared to be an enemy country. Thus, *in view of this basic change in both the law and the facts under which Wells Fargo was decided*, the application of the doctrine of collateral estoppel to preclude NBP from litigating the issue now before the court would be inappropriate.

(A-16-17)(emphasis added).

The lower court's rejection of the guarantee of rights contained in the TRA is central to the outcome below because the change in recognition policy is the only distinction made by the lower court between *Wells Fargo* and the facts presented to it.

> In the *Wells Fargo* case, the issue to be determined was whether BOC-Beijing or BOC-Taipei [ICBC] was entitled to the funds of the [Bank of China] on deposit with an American bank after the liberation of mainland China, *at a time when the executive branch of our government chose to recognize the ROC as the 'legal' China. In this action*, the issue to be determined is whether ICBC is entitled to retain funds blocked as assets of China which were originally received as a credit for the account of what subsequently became a

> branch of the BOC choosing to ally itself with BOC-Beijing, *after relations between the United States and the PRC were normalized.* Although these issues may be related, they cannot be characterized as identical.

(A-16)(emphasis added). Except for the last underlined clause in the paragraph quoted above, the lower court's description of the issues before it exactly describes the issues determined in *Wells Fargo*, where the court addressed the question whether ICBC was entitled to retain funds blocked as assets of China which were originally received as a credit for the accounts of the Tientsin and Tsingao (mainland China) branches of the Bank of China which had allied themselves with BOC-PRC. But, the normalization of relations between the United States and the PRC is precisely the factor that may not be considered by "any Court in the United States" under law established by this Court as well as the express language of the TRA. Therefore, the lower court invalidated the protections afforded to petitioner under the TRA in two respects: first, by finding the TRA ineffective in requiring the courts to recognize pre-existing rights and prior judgments, and second, in relying on the fact of a change in recognition to avoid the collateral estoppel and res judicata effect of the earlier judgment. As this Court stated in *Guaranty Trust*:

> This is tantamount to saying that the judgments in suits maintained here by the diplomatic representatives of the Provisional Government, valid when rendered, became invalid upon recognition of the Soviet Government.

304 U.S. at 140.

The court also denied petitioner the protection afforded under § 3303(b)(3)(A) of the TRA, which expressly provides that the absence of recognition with respect to Taiwan shall not "affect in any way any rights or obligations . . . under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan."

REASONS FOR GRANTING THE WRIT

1. The New York Court of Appeals, by Denying Leave to Appeal, Left Standing the Decision Below Which Is Characterized by Flat Rejection of Controlling Federal Law in Four Distinct Areas

A. *The Statute Which Congress Found Necessary To Enact In The Interest Of "Peace, Security, And Stability" And "To Promote The Foreign Policy Of The United States" Is Denied Effectiveness*

The TRA expressly recites the finding of Congress that the President's termination of relations with Taiwan (ROC) made the enactment of the TRA "necessary" to help "maintain peace, security and stability in the Western Pacific" and to promote the foreign policy of the United States." 22 U.S.C. 3301(a). The law which Congress found it "necessary" to enact *because* the President recognized the PRC now has been nullified by the New York court on the ground that the President's announcement of the impending change in recognition (A-10) rendered the law ineffective (A-17).

Recognition of the PRC and the TRA became effective simultaneously on January 1, 1979. *Compare* S. Rep. No. 7, 96th Cong., 1st Sess. 6 (1979), *reprinted in* 1971 U.S. Code Cong. & Ad. News 41 ("on December 15, 1978, President Carter announced that, on January 1, 1979, the United States would recognize the PRC") *with* Pub. L. No. 96-8 § 18 (1979) ("This Act [Taiwan Relations Act] shall be effective as of January 1, 1979").

The TRA has been the subject of very little scrutiny and no consideration whatsoever by this Court. The intent of Congress is stated in plain language and restricts the legal effect that may be given to the change in recognition to the PRC. The impact of the holding below is to deprive Congress of the power to act in this area.

At the very least, denial of the effectiveness of the TRA threatens the authority of Congress to participate in matters

affecting foreign relations and creates dangerous uncertainties in the uniquely delicate balance Congress sought to achieve in our nation's relationship with both Taiwan and mainland China by enacting the TRA.

B. *The Decision Conflicts Head On With The Decisions Of This Court Limiting the Effect That May Be Given To A Change In Recognition*

The effect given to the change in recognition from the ROC to the PRC is contrary to the decisions of this Court in *Kennett v. Chambers*, 55 U.S. 38 (1852), and *Guaranty Trust Co. of New York v. United States*, 340 U.S. 126, 140-41 (1938), and the House of Lords in *Boguslawski et ano. v. Gdynia Ameryba Lince*, 2 Lloyd's List L.R. 57 (1952) (*Boguslawski* cites *Guaranty Trust* with approval and applies its holding to a dispute involving a prior and later recognized government of Poland).

Under these decisions *Wells Fargo* is controlling. However, even if there had never been a *Wells Fargo* judgment, the PRC had no rights in the funds in issue in 1971 when it made the assignment and the subsequent recognition in 1979 could not create any such right. "[C]ourts of justice are bound to consider the ancient state of things as remaining unaltered" in this context. *Kennett v. Chambers*, 55 U.S. 38, 50. The "unaltered" state of things in 1971 was that the ROC was still the owner of the funds purportedly assigned by the PRC. *Guaranty Trust*, *supra*, is to the same effect.

C. *The Effect Of The Decision Is To Nullify The FAC Regulations, A Vital Tool In Enforcing The Foreign Policy Of The United States*

The Foreign Assets Control regulations pertaining to assets in the United States essentially have been rendered void in direct conflict with the decisions of this Court in *Dames & Moore v. Regan*, 453 U.S. 654 (1981), and *Propper v. Clark*, 337 U.S. 472, 493 (1949), and the Court of Appeals for the Second Circuit in

Chang Yih-Chan v. Federal Reserve Bank of New York, 442 F.2d 460 (1971).

D. *The Federal "Act Of State" Doctrine Is Applied, Contrary To The Law Established By Federal Courts Of Appeal, In Order To Uphold An Assignment Of Property In The United States, Which Assignment Is Prohibited And Declared Void By Express United States Law*

The "act of state" doctrine has been applied extraterritorially to preclude judicial review of a prohibited assignment of property in the United States in direct conflict with the decision in *Bandes v. Harlow & Jones, Inc.*, 852 F.2d 551 (2nd Cir. 1988).

2. **The Importance of the Issues Lies in the Impact of Their Determination Adversely to (1) the Declared Intent of Congress, (2) the Foreign Relations Policy of the United States, (3) the Stability of International Business Transactions and (4) the Binding Effect of Judgments of Our Courts Upon Foreign Governments**

In rejecting the TRA, the New York court has stumbled in the field of international relations and also made an erroneous ruling regarding the powers of Congress *vis a vis* the President in this field. In the commercial arena, the decision as to the TRA effectively puts in jeopardy all the business conducted, financial transactions had and judgments entered during the twenty-nine years the United States did not recognize the People's Republic of China and recognized only the Republic of China (the governing authorities on Taiwan) as the *de jure* Government of China.

The court's rejection of the federal law most recently stated by this Court in *Guaranty Trust, supra*, as to the limited effect to be given to a change in recognition renders similarly vulnerable the rights, property and transactions in the United States of governments and agencies of every other country in the world conducting business in the United States.

Further, it is now New York law that the acts of a declared enemy sovereign in violation of the laws of the United States as to property here may not be judicially reviewed under the act of state doctrine. The FAC regulations may be evaded by executing overseas an assignment of assets located both in the United States and overseas.

Petitioner respectfully submits that the questions presented are worthy of consideration by this Court at this time.

CONCLUSION

Guidance from this Court is needed now on each of the substantial federal questions presented and this petition for a writ of certiorari ought to be granted.

Dated: New York, New York
September 12, 1989

Respectfully submitted,

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APPENDIX

APPENDIX A

THE TAIWAN RELATIONS ACT, 22 U.S.C. §§ 3301 *et seq.* provides in pertinent part:

§ 3301. *Congressional findings and declaration of policy*

(a) *Findings*

The President having terminated governmental relations between the United States and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1 1979, the Congress finds that the enactment of this chapter is necessary—

(1) to help maintain peace, security, and stability in the Western Pacific; and

(2) to promote the foreign policy of the United States by authorizing the continuation of commercial, cultural, and other relations between the people of the United States and the people on Taiwan.

§ 3303. *Application to Taiwan of laws and international agreements*

(a) *Application of United States laws generally*

The absence of diplomatic relations or recognition shall not affect the application of the laws of the United States with respect to Taiwan, and the laws of the United States shall apply with respect to Taiwan in the manner that the laws of the United States applied with respect to Taiwan prior to January 1, 1979.

(b) *Application of United States laws in specific and enumerated areas*

The application of subsection (a) of this section shall include, but shall not be limited to, the following:

* * *

(3)(A) The absence of diplomatic relations and recognition with respect to Taiwan shall not abrogate, infringe, modify, deny, or otherwise affect in any way any rights or obligations (including but not limited to those involving contracts, debts, or property interests of any kind) under the laws of the United States heretofore or hereafter acquired by or with respect to Taiwan.

(B) For all purposes under the laws of the United States, including actions in any court in the United States, recognition of the People's Republic of China shall not affect in any way the ownership of or other rights or interests in properties, tangible and intangible, and other things of value, owned or held on or prior to December 31, 1978, or thereafter acquired or earned by the governing authorities on Taiwan.

§ 3314. *Definitions*

For purposes of this chapter—

(1) the term 'laws of the United States' includes any . . . judicial rule of decision of the United States or any political subdivision thereof; and

(2) the term 'Taiwan' includes, as the context may require, the islands of Taiwan and the Pescadores, the people on those islands, corporations and other entities and associations created or organized under the laws applied on those islands, and the governing authorities on Taiwan recognized by the United States as the Republic of China prior to January 1, 1979, and any successor governing authorities (including political subdivisions, agencies, and instrumentalities thereof).

(Pub. L. 96-8, Apr. 10, 1979, 93 Stat. 14).

Effective Date

Section 18 of Pub. L. 96-8 provided that: "This Act [this chapter] shall be effective as of January 1, 1979."

APPENDIX B

Foreign Assets Control Regulations
Promulgated Under The Provisions Of The
United States Trading With The Enemy Act,
50 U.S.C. App. § 59(b) In Effect From
December 17, 1950 Until January 31, 1980 As
To China, As A "Designated" Foreign Country.

31 C.F.R. § 500.201:

Transactions involving designated foreign countries or their nationals; effective date. (a) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if either such transactions are by, or on behalf of, or pursuant to the direction of any designated foreign country, or any national thereof, or such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsoever, direct or indirect:

(1) All transfers of credit and all payments between, by, through, or to any banking institution or banking institutions wheresoever located, with respect to any property subject to the jurisdiction of the United States or by any person (including a banking institution) subject to the jurisdiction of the United States;

(2) All transactions in foreign exchange by any person within the United States; and

(3) The exportation or withdrawal from the United States of gold or silver coin or bullion, currency or securities, or the earmarking of any such property, by any person within the United States.

(b) All of the following transactions are prohibited, except as specifically authorized by the Secretary of the Treasury (or any person, agency, or instrumentality designated by him) by means of regulations, rulings, instructions, licenses, or otherwise, if such transactions involve property in which any designated foreign country, or any national thereof, has at any time on or since the effective date of this section had any interest of any nature whatsover, direct or indirect:

(1) All dealings in, including, without limitation, transfers, withdrawals, or exportations of any property or evidences of indebtedness or evidences of ownership of property by any person within the United States; and

(2) All transfers outside the United States with regard to any property or property interest subject to the jurisdiction of the United States.

(c) Any transaction for the purpose or which has the effect of evading or avoiding any of the prohibitions set forth in paragraphs (a) or (b) of this section is hereby prohibited.

(d) The term 'designated foreign country' means a foreign country in the following schedule and the term 'effective date' and the term 'effective date of this section' mean with respect to any designated foreign country, for any national thereof, 12:01 a.m. eastern standard time, of the date specified in the following schedule:

SCHEDULE

Country and Effective Date

1. China: December 17, 1950

31 CFR § 500.203(a):

> Any transfer after the 'effective date' which is in violation of any provision of this chapter or of any regulation. . . thereunder and involves any property in which a designated national has or has had an interest since such 'effective date' is null and void and shall not be the basis for the assertion or recognition of any interest in or right, remedy, power or privilege with respect to such property.

31 CFR § 500.302:

> *National.* (a) The term 'national' shall include:
>
> (1) A subject or citizen of or any person who has been domiciled or resident in a foreign country at any time on or since the 'effective date.'
>
> (2) Any partnership, association, corporation, or other organization, organized under the laws of, or which on or since the 'effective date' had or has had its principal place of business in a foreign country, or which on or since such effective date was or has been controlled by or a substantial part of the stock, shares, bonds, debentures, notes, drafts, or other securities or obligations of which, was or has been owned or controlled by, directly or indirectly, a foreign country and/or one or more nationals thereof as defined in this section.
>
> (3) Any person to the extent that such person is, or has been, since the 'effective date' acting or purporting to act directly or indirectly for the benefit or on behalf of any national of a foreign country.

(4) Any other person who there is reasonable cause to believe is a 'national' as herein defined.

(b) The Secretary of the Treasury retains full power to determine that any person is or shall be deemed to be a 'national' within the meaning of this section and to specify the foreign country of which such person is or shall be deemed to be a national.

31 CFR § 500.310:

The term 'transfer' shall mean any actual or purported act or transaction, . . . whether or not done or performed within the United States, the purpose, intent, or effect of which is to. . . transfer. . . any right, . . . or interest with respect to any property and without limitation upon the foregoing shall include the making, execution, or delivery of any assignment.

31 CFR § 500.311:

Property; property interests. Except as defined in § 500.203(f) for the purposes of that section the terms 'property' and 'property interest' or 'property interests' shall include, but not by way of limitation, money, checks, drafts, bullion, bank deposits, savings accounts, any debts, indebtedness, obligations, notes, debentures, stocks, bonds, coupons, any other financial securities, bankers' acceptances, mortgages, pledges, liens or other rights in the nature of security, warehouse receipts, bills of lading, trust receipts, bills of sale, any other evidences of title, ownership or indebtedness, powers of attorney, goods, wares, merchandise, chattels, stocks on hand, ships, goods on ships, real estate mortgages, deeds of trust, vendors' sales agreements, land contracts, real estate and any interest therein, leaseholds, ground rents, options, negotiable instruments, trade acceptances, royalties, book accounts, accounts payable, judgments, patents, trademarks, copyrights, contracts or licenses affecting or involving patents, trademarks or

copyrights, insurance policies, safe deposit boxes and their contents, annuities, pooling agreements, contracts of any nature whatsoever, and any other property, real, personal, or mixed, tangible or intangible, or interest or interests therein, present, future, or contingent.

31 C.F.R. § 500.314:

Banking institution. The term 'banking institution' shall include any person engaged primarily or incidentally in the business of banking, of granting or transferring credits, or of purchasing or selling foreign exchange or procuring purchasers and sellers thereof, as principal or agent, or any person holding credits for others as a direct or incidental part for his business, or any broker; and, each principal, agent, home office, branch or correspondent of any person so engaged shall be regarded as a separate 'banking institution.'

31 C.F.R. § 500.402:

Effect of amendment of sections of this chapter or of other orders, etc. Any amendment, modification, or revocation of any section of this chapter or of any order, regulation, ruling, instruction, or license issued by or under the direction of the Secretary of the Treasury pursuant to sections 3(a) or 5(b) of the Trading With the Enemy Act, as amended, shall not unless otherwise specifically provided be deemed to affect any act done or omitted to be done, or any suit or proceeding had or commenced in any civil or criminal case, prior to such amendement, modification, or revocation, and all penalties, forfeitures, and liabilities under any such section, order, regulation, ruling, instruction or license shall continue and may be enforced as if such amendment, modification, or revocation had not been made.

APPENDIX C

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on February 2, 1989.

Present—Hon. John Carro, Justice Presiding
E. Leo Milonas
Richard W. Wallach
George B. Smith, Justices.

National Bank of Pakistan,

Plaintiff-Respondent,

—against— 35928

The International Commercial Bank of China,

Defendant-Appellant.

An appeal having been taken to this Court by the above-named appellant, from an order of the Supreme Court, New York County (Elliott Wilk, J.) entered on or about March 27, 1988, and said appeal having been argued by Henry J. Formon, of counsel for the appellant, and by Richard S. Last, of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered that the order so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

FRANCIS X. GALDI
DEPUTY Clerk.

APPENDIX D

SUPREME COURT: NEW YORK COUNTY
INDIVIDUAL ASSIGNMENT PART 6
- X

NATIONAL BANK OF PAKISTAN,

Plaintiff,

—against— Index No. 20274/83

THE INTERNATIONAL COMMERCE BANK OF CHINA,

Defendant.
- X

ELLIOTT WILK, J.[1]:

Plaintiff moves for summary judgment pursuant to CPLR 3212. Defendant cross moves for the same relief.

This action concerns the right to the sum of $642,375.38 on deposit with defendant International Commercial Bank of China ("ICBC"). In 1912, the Bank of China ("BOC") was chartered. Pursuant to the Articles of Association by which it was created, the majority of the Board of Directors of the bank were to be appointed by the government, thus enabling it to function as an arm of the government.

Prior to 1949, BOC maintained numerous branches throughout China and the world. One branch was established in Chittagong, Pakistan ("BOC-Chittagong") and another in Karachi, Pakistan (now Bangladesh) ("BOC-Karachi"). A banking agency was also established in New York City ("BOC-NY"). In 1971, BOC-NY changed its name to ICBC.

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[1] I acknowledge the assistance of Paula Havener in the preparation of this opinion.

In 1949, the People's Liberation Army liberated mainland China. The People's Republic of China ("PRC") continued to operate BOC-Beijing as the banking arm of its government. The defeated forces fled to Taiwan, where they established the government of the Republic of China ("ROC") and set up a branch of the BOC in Taipei ("BOC-Taipei"), which was operated as the official bank of the ROC.

The *de facto* division of the BOC into two distinct banking entities forced each branch and agency of the bank to declare its loyalty either to BOC-Beijing or to BOC-Taipei. BOC-NY allied itself with BOC-Taipei. BOC-Karachi and BOC-Chittagong affiliated with BOC-Beijing. Upon learning of the position taken by the Karachi and Chittagong branches, BOC-Taipei "froze" or "blocked" all money on deposit with it from branches which associated themselves with the PRC. This "freeze" is evidenced by an internal memo dated January 16, 1950. On December 17, 1950, the United States Government promulgated regulations which had the result of freezing all assets in this country in which the PRC or its nationals claimed an interest. Trading With The Enemy Act, 50 U.S.C. App. § 5 (b); Executive Order 9193; Foreign Assets Control Regulations, §31 C.F.R. Part 500, hereinafter referred to as the "FAC Regulations".

Notwithstanding the establishment of the PRC, the United States recognized the ROC as the true government of China. The Recognition of the ROC to the exclusion of the PRC was judicially sanctioned in 1952. *Bank of China v. Wells Fargo Bank & Union Trust Co.*, 104 F. Supp. 59, (N.D. Ca. 1952) *aff'd* 209 F.2d 467 (9th Cir. 1953) hereinafter referred to as "*Wells Fargo*".

Richard Nixon's February 21, 1972, trip to Beijing culminated in the signing of the Shanghai Communique, which committed the United States and the PRC to "normalize" relationships. The normalization process was completed on December 15, 1978 when Jimmy Carter announced that the United States would finally recognize the PRC as the sole legal government of China.

On January 31, 1980, the regulations blocking the assets of the PRC in this country were repealed. The National Bank of Pakistan ("NBP"), as assignee of BOC-Beijing, demanded that ICBC (formerly BOC-NY) release to it the BOC-Karachi and the BOC-Chittagong deposits. When ICBC refused, this action was commenced. Both NBP and ICBC now move for summary judgment, claiming legal entitlement to the disputed funds.

Copies of BOC-NY's internal account statements prepared in 1949 and 1950 suggest that at that time, BOC-Chittagong had an account balance of $96,252.18 with BOC-NY, and the Karachi branch had a balance of $546,120.59. *See generally Guaranty Trust Co. of New York v. Lyon*, 124 NYS2d 680 (Sp. Ct. NY Co. 1955). The deposition of ICBC's vice president (pages 289, 313, 318, 326) also supports plaintiff's contention that there was money on deposit with ICBC in 1950.

Plaintiff also relies upon ICBC's account statements and inter-branch memos which indicate that the accounts of the BOC-Karachi and BOC-Chittagong were blocked. Stamps on the BOC-Karachi and BOC-Chittagong accounts that began to appear on the statements in 1950 state that "account blocked in accordance with Executive Order No. 9193" and "reported on TFR-603". Several letters from the United States Treasury Department confirm that the accounts were blocked. *See Chase Manhattan Bank v. United China Syndicate, Ltd.*, 180 F. Supp. 848 (S.D. N.Y. 1960). Plaintiff also argues that this claim would be further supported by the TFR-603 forms themselves, which ICBC has repeatedly refused to supply. Plaintiff concludes that this evidentiary showing is adequate to support a finding that the accounts exist and that each contains the amount of money demanded in this action. *See Banque Mellie Iran v. Yokohama Specie Bank, Ltd.*, 299 NY 139 (1949), *aff'd* 339 US903 (1950); *Singer v. Yokohama Specie Bank, Ltd.*, 293 NY 542 (1944); *cf Buxhoeveden v. Estonian State Bank*, 106 NYS2d 287 (Sp. Ct. Queens Co. 1951).

NBP then asserts that it acquired BOC-Beijing's interest in the accounts of the Chittagong and Karachi branches in New

York by virtue of a 1971 assignment. This contention is supported by copies of the correspondence between the two governments wherein the PRC indicated its intention to make a gift of these two branches to Pakistan in consideration for the friendly relations and cooperation between the two nations. Plaintiff also relies upon the August 31, 1971 agreement pursuant to which BOC-Beijing assigned to NBP all of its liabilities, assets and undertaking in the two branches. Plaintiff offers a number of other documents and certificates executed between the parties to carry out the transfer. NBP concludes, therefore, that having made an evidentiary showing sufficient to support a possessory claim to the BOC-Karachi and BOC-Chittagong funds on deposit in New York, it was entitled to the funds as of January 31, 1980, the date on which the FAC regulations were amended to permit the free transfer of all Chinese assets previously blocked by Section 500.201.

ICBC contends that BOC-Chittagong and BOC-Karachi had no funds "on deposit". ICBC claims that all of the assets held by any of BOC's branches were part of the same common enterprise operated by a single banking corporation then called BOC and controlled by ICBC's head office in Taipei.

ICBC correctly observes that foreign branches of a bank are not considered by the courts to be independent agencies. They are considered to be instrumentalities through which the parent bank carries on business. *See Perez v. Chase Manhattan Bank*, 61 NY2d 460, *rearg. den.* 62 NY2d 943, *cert. den.* 469 U.S. 966 (1984); *Sokoloff v. The National City Bank of New York*, 130 Misc. 66 (Sp. Ct. NY Co. 1927), *aff'd* 223 AD 754 (1st Dept.), *aff'd* 250 NY 69 (1928). After the 1949 revolution, however, BOC-Beijing and BOC-Taipei functioned as two independent rival banks. Thus, ICBC's contention that the BOC offices in Chittagong and Karachi should be treated as branches of BOC-Taipei is unsupportable.

ICBC then attempts to establish that it cannot legally have any money "on deposit" on behalf of BOC-Karachi BOC-Chittagong because Banking Law § 202-a prohibits the agency of a foreign banking corporation from accepting deposits

within this state. Plaintiff claims that the account balances maintained by BOC-NY for BOC-Karachi and Chittagong may be characterized as "credit balances incidental to, or arising out of, the exercise of [ICBC's] lawful powers" as permitted by Section 202-a(1)(a). ICBC apparently takes the position that because it was not authorized to accept credit balances on behalf of its other branches, these balances evidence money held by ICBC's main branch in Taipei rather than money on deposit in New York. Even if accepted as true, this contention is legally insufficient to deprive plaintiff of its right to possession of the funds.

In the first instance, ICBC offers no support for its claim that an agency cannot maintain a credit balance for one of its branches. *See Guaranty Trust Company of New York v. Lyon, supra.* Moreover, even if the balances are construed as being owned by BOC-Taipei, the money would still be on deposit in Taipei on behalf of BOC-Karachi and BOC-Chittagong. As stated by ICBC in support of its previous argument, the main office of a bank and its branches are treated as a single legal entity by our courts. Thus, or purposes of this action, whether the money is actually "on deposit" in New York or "on deposit" in Taipei is a distinction having no practical effect.

Alternatively, ICBC seeks to establish that the 1971 assignment between BOC-Beijing and NBP is null and void. In support of this position, ICBC first contends that BOC-Beijing lacked the juridical corporate capacity to make a gift of any of its branches in 1971. This argument, being but another attempt to establish that BOC-Taipei was the true legal embodiment of the BOC chartered in 1912, is without merit.

ICBC then argues that the assignment is void by virtue of the FAC regulations.

The FAC regulations were promulgated on December 17, 1950 by the United States Department of Treasury pursuant to the Trading with the Enemy Act (50 U.S.C. App. § 5[b][1]) and Executive Order 9193, which transferred the president's authority to enact rules and regulations to the Secretary of the Treasury. The regulations were enacted for the purpose of curtailing all

commercial transactions and property transfers between the United States and persons over whom it has jurisdiction and certain "designated foreign countries" and their nationals unless a license was first obtained from the secretary. 31 C.F.R. § 500.201. The PRC was included as a designated foreign country. *Id.* The terms "foreign country" and "national" were broadly defined to include all governmental entities, all citizens or residents thereof, and all businesses located in the country or substantially owned or controlled by a national of that country. 31 C.F.R. 500.301, 500.302. In prohibiting the transfer of any property subject to the jurisdiction of the United States, the regulations specifically included "[a]ll transfers of credit and all payments between, by, through, or to any banking institution. . . ." (31 C.F.R. 500.201 [a][1]), including, without limitation, "the making, execution, or delivery of any assignment." 31 C.F.R. 500.310.

The PRC undeniably had an interest in the BOC-Karachi and BOC-Chittagong funds on deposit with ICBC in 1949. It is equally clear that the deposits have their situs in New York. Indeed, ICBC concedes that if the deposits exist at all, they exist here. Thus, the transfer of the disputed funds in 1971 is within the scope of transactions prohibited by the FAC regulations. 31 C.F.R. 500.203.

Contrary to the argument advanced by ICBC, however, the FAC regulations do not provide this Court with legal authority to declare the 1971 assignment null and void in its entirety. Although the United States has jurisdiction over the deposits of BOC-Chittagong and BOC-Karachi located in New York, these deposits are but a small portion of the assets, liabilities and undertakings assigned by BOC-Beijing to NBP under the 1971 agreement. The United States has no jurisdiction over the remainder of the transferred assets of BOC-Beijing located abroad and has no jurisdiction over Pakistan, China, or their respective banks. 31 C.F.R. 500.313, 500.329, 500.300. Thus, although the FAC regulations give the United States the authority to declare the transfer of assets located within our boundaries or transferred by persons over whom the United States may

assert jurisdiction to be null and void, the regulations do not confer upon the courts the authority to declare void an assignment agreement made overseas between two sovereign countries with regard to assets held abroad. The cases relied upon by ICBC in support of its argument are not to the contrary. *See, e.g. Cheng Yih-Chun v. Federal Reserve Bank of New York*, 442 F.2d 460 (2nd Cir. 1971); *Ferrera v. United States*, 424 F. Supp. 888 (S.D. Fla. 1976).

Furthermore, pursuant to the "act of state" doctrine, the courts of one sovereign state are precluded from reviewing the acts of another sovereign state done within its own territory *First National City Bank v. Banco Nacional of Cuba*, 406 US 759, *rehearing den.* 409 US 897 (1972). Thus, acts of a sovereign are presumed to be valid by the courts of this country. *See generally, Zweibon v. Mitchell*, 516 F2d 594 (D.C. Cir. 1975), *cert. den. Barrett v. Zweibon*, 425 US 944 (1976). This is true even though the PRC was not recognized by our government at the time of the transaction (*See generally, Karl Zeiss Stiftung v. V.E.B. Carl Zeiss Jena*, 293 F. Supp. 892 (S.D.N.Y. 1968). Thus, the "act of state" doctrine also compels the conclusion that the courts of this country are without jurisdiction to declare the 1971 assignment to be null and void.

Because the FAC regulations only block the transfer of funds within the United States as intended by the 1971 assignment, but do not effect the presumptive validity of the assignment itself, it follows that once the FAC regulations were amended on January 31, 1980, to make freely alienable all property in which the PRC or one of its nationals had an interest, subject to certain limited exceptions not relevant here (31 CFR 505.10), the 1971 assignment could be fully effectuated by permitting the transfer of the funds previously blocked pursuant to Section 500.201. Furthermore, having determined that the 1971 assignment was never void in the first instance, Section 500.402 of the regulations, which prohibits the revival of previously void acts, is no bar to the transfer of the previously blocked funds once the accounts were unblocked.

ICBC then seeks to overcome plaintiff's prima facie showing of entitlement to summary judgment by arguing that plaintiff,

as the assignee of BOC-Beijing, is collaterally estopped by the *Wells Fargo* decision from relitigating the issue of BOC-Beijing's entitlement to funds on deposit in the United States. This argument is also unpersuasive.

In order to invoke the doctrine of collateral estoppel, there must first be "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action. . . . [T]here [also] must have been a full and fair opportunity to contest the decision now said to be controlling." *Schwartz v. Public Administrator of the County of Bronx*, 24 NY2d 65, 71 (1969). In the *Wells Fargo* case, the issue to be determined was whether BOC-Beijing or BOC-Taipei was entitled to the funds of the BOC on deposit with an American bank after the liberation of mainland China, at a time when the executive branch of our government chose to recognize the ROC as the "legal" China. In this action, the issue to be determined is whether ICBC is entitled to retain funds blocked as assets of China which were originally received as a credit for the account of what subsequently became a branch of the BOC choosing to ally itself with BOC-Beijing, after relations between the United States and the PRC were normalized. Although these issues may be related, they cannot be characterized as identical.

Moreover, it is well settled that collateral estoppel is a flexible doctrine which defies rigid or mechanical application. *Id.* Applicability of the doctrine should be determined on a case-by-case basis, with the overall fairness of applying the doctrine being the crowning consideration. *Sucher v. Kutscher's Country Club*, 113 AD2d 928, 931 (2nd Dept. 1985). Changes in the law and changes in circumstances are among the factors to be considered in making such a determination. *Gilberg v. Barbieri*, 53 NY2d 285, 292 (1981); see, e.g., *Sucher, supra; R.G. Barry Corporation v. Mushroom Makers, Inc.*, 85 AD2d 544 (1st Dept. 1981); *accord Costello v. Pan American World Airways, Inc.*, 294 F. Supp. 1384 (S.D. N.Y. 1969).

The key factor relied upon in *Wells Fargo* was our nation's diplomatic recognition of the ROC to the exclusion of the PRC.

Since the decision was rendered, however, our government has recognized the PRC and has repealed the regulations pursuant to which the PRC was declared to be an enemy country. Thus, in view of this basic change in both the law and the facts under which *Wells Fargo* was decided, the application of the doctrine of collateral estoppel to preclude NBP from litigating the issue now before the court would be inappropriate.

The Taiwan Relations Act (22 U.S.C. 3301 *et seq.*) does not mandate a different conclusion. In seeking to accomplish its goal of continuing commercial, cultural and other relations between the United States and Taiwan (22 U.S.C. 3301), that act did provide that the laws of United States would continue to be applied to Taiwan in the same manner as on January 1, 1979. 22 U.S.C. 3303(a). The term "laws of the United States" was defined to include "any statute, rule, regulation, ordinance, order or judicial rule of decision of the United States or any political subdivision thereof." 22 U.S.C. 3314(1).

ICBC argues that these provisions require this court to give the *Wells Fargo* decision conclusive effect in this case. Because the Taiwan Relations Act was promulgated after the United States declared that it would recognize the PRC as the sole legal government of China, there is no basis to support ICBC's contention that the act was intended to continue the pre-1978 status between the ROC and the United States.

NBC is entitled to summary judgment and is awarded possession of the BOC-Karachi and BOC-Chittagong funds on deposit with ICBC.

In asserting its claim for interests, NBP alleges that it may be entitled to interest since August 31, 1971, when it became the legal owner of the funds, or from December 17, 1950, when the funds first became blocked. There is, however, no statutory or contractual provisions entitling NBP to such relief. CPLR 5001(a) provides that interest is recoverable if a judgment is obtained because of a breach of performance of a contract, or because of an act or omission depriving a party of its property. There is no breach of contract claim asserted here. Because

ICBC's actions in blocking the funds were mandated by federal law, an award of interest by virtue of such blocking would be inequitable.

As of March 2, 1979, however, the regulations pursuant to which the subject funds were blocked were amended to provide that all property being so held must be held in an interest bearing account (31 C.F.R. 500.205). NBP is, therefore, entitled to recover interest since that date.

Accordingly, plaintiff's motion for summary judgment is granted; defendant's cross motion for the same relief is denied. The clerk is directed to enter judgment in favor of the plaintiff in the amount of $642,375.38, plus interest since March 2, 1979, costs and disbursements.

The foregoing shall constitute the order and decision of this Court.

DATED: March 29, 1988

s/
J. S. C.

FILED
APR 5, 1988
N.Y. CO. CLK'S OFFICE

APPENDIX E

State of New York
Court of Appeals

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of June A.D. 1989

Present, HON. SOL WACHTLER, *Chief Judge, presiding.*

1-10 Mo. No. 395
National Bank of Pakistan,
Respondent,
v.
The International Commercial Bank of China,
Appellant.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

/s/ Donald M. Sheraw

Donald M. Sheraw
Clerk of the Court

APPENDIX F

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

NATIONAL BANK OF PAKISTAN,

Plaintiff,

INDEX NO.
20274/83

—against—

THE INTERNATIONAL COMMERCIAL BANK OF CHINA,

Defendant.

JUDGMENT

PLAINTIFF National Bank of Pakistan, having duly moved for an order pursuant to C.P.L.R. Sectin 3212, granting summary judgment in its favor and against defendant The International Commercial Bank of China, for the amount demanded in the complaint with applicable interest costs and disbursements and said motion coming regularly or to be heard, and the Court having rendered its written decision and order dated March 29, 1988 and same having been filed in the Office of the Clerk of New York County on April 5, 1988 granting the said motion for summary judgment, and the said decision and order having been affirmed by unanimous written decision and order of the Appellate Division of the Supreme Court of the State of New York, First Department filed on February 2, 1989, and defendant having moved the Court of Appeals for leave to appeal, and said motion being denied by order dated June 15, 1989, and

PLAINTIFF National Bank of Pakistan having duly moved for an order pursuant to C.P.L.R. Sections 5001, 5002, 5004 and 5016, directing the Clerk to compute pre-judgment interest pursuant to the calculations and statutory authority appended

thereto, and said motion coming regularly before the Court to be heard, and the Court having rendered its written decision and order dated January 19, 1989, and filed with the Office of the Clerk of New York County on January 27, 1989, denying said motion and ordering interest to be calculated in the manner set forth therein, and said decision and order having been affirmed by unanimous written order of the Appellate Division of the Supreme Court of the State of New York, First Department, filed on or about May 18, 1989.

NOW, upon the annexed affidavit of A. Memon, sworn to on the 21st day of June, 1989, which is attached hereto and made a part hereof, with respect to certain pre-judgment interest calculations, and on motion of Dunn & Zuckerman, P.C., attorneys for plaintiff, it is

ADJUDGED that plaintiff National Bank of Pakistan, having a banking office at 100 Wall Street, New York, New York 10005, shall recover of defendant, the International Commercial Bank of China, having a banking office at 40 Wall Street, New York, New York 10005, the sum of $642,375.38 with interest thereon from March 2, 1979 to January 31, 1980 in the amount of $69,218.95, amounting to the sum of $711,594.33, and interest on that said amount at the rate of six percent per annum from February 1, 1980 to June 25, 1981, in the amount of $59,656.94, and interest on $711,594.33 from June 26, 1981 to march 29, 1988, the date of the said decision granting plaintiff summary judgment, in the amount of $433,039.27, amounting to the sum of $1,204,290.54, and interest on that said sum of $1,204,290.54 at the rate of nine percent per annum from March 29, 1988 to the date hereof in the amount of $143,310.57, amounting to the sum of $1,347,601.11, together with costs and disbursements in the amount of $494.40, for a total amount of $1,348,095.51, and that plaintiff shall have execution therefor.

ENTER: _____

CLERK

FILED JUL 25 1989
COUNTY CLERK'S OFFICE NEW YORK

(2)

No. 89-429

IN THE

Supreme Court of the United States

October Term, 1989

THE INTERNATIONAL COMMERCIAL BANK OF CHINA,
Petitioner,

against

NATIONAL BANK OF PAKISTAN,
Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

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(8027)

17 pp

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STATUTES:

No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

THE INTERNATIONAL COMMERCIAL BANK OF CHINA,

Petitioner,

against

NATIONAL BANK OF PAKISTAN,

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari

The Respondent, National Bank of Pakistan ("NBP"), herewith respectfully submits this brief in opposition to the petition of The International Commercial Bank of China ("ICBC") for a writ of certiorari.

ICBC's "Questions Presented"

None of the four questions ICBC presents in its petition warrant review. The first two are not proper statements of issues in this case and have no relationship to the findings below. The subject decision leaves wholly intact the prior

judgment ICBC refers to, in which the Republic of China and/or its agencies were parties. The decision below did not void or in any manner alter that prior judgment which was collected and satisfied.

ICBC's third question misstates the Foreign Assets Control Regulations' prohibition against certain transfers of assets. The Regulations' provisions apply, by their very terms, only to transactions carried out by persons subject to the jurisdiction of the United States (Record on Appeal "R", 603, 606). The assignment under which NBP claimed title to the funds in dispute was created by an agreement between two foreign sovereign governments and effectuated by two foreign banks, none of which were persons subject to U.S. jurisdiction. ICBC's fourth question likewise misstates the Regulations' scope of applicability, as well as the act of state doctrine, which, in fact, bars a U.S. court from reviewing the propriety and validity of the foreign assignment.

ICBC's questions are thus either irrelevant or based upon incorrect fundamental premises, and, as such, do not offer grounds for review.

Statement of the Case

Legal Statement

This case has a most unique fact pattern which is hardly capable of repetition. The decision below, which rests squarely on those facts, presents no novel or important issue for consideration.

The points of law addressed by the trial judge were so clear and properly handled that no elaboration was required by the Appellate Division, First Department, which unanimously affirmed the order without opinion. ICBC then moved the Court of Appeals, New York's highest court, for leave to appeal on the alleged ground that the same issues it

now raises herein were of "public importance." The Court of Appeals found none of ICBC's alleged issues to be of any significance.

Factual Statement

In consideration of the friendly relations and cooperation offered by the Government of Pakistan to the People's Republic of China ("PRC"), the latter in 1971 agreed to assign all the assets and liabilities of the Karachi branch and Chittagong subbranch of Bank of China ("BOC") to the Government of Pakistan (R 60). Both the Karachi branch and Chittagong subbranch of BOC had at all times remained loyal and subject to the direction of BOC on Mainland China. The PRC designated the Karachi branch of BOC, and the Government of Pakistan designated the National Bank of Pakistan to consummate the agreement and transfer. The two said banks thereafter signed an agreement dated August 17, 1971 memorializing the directive of the agreement entered into between the two sovereign states, whereby all assets, as well as debts and undertakings of the said BOC branch and subbranch, were assigned to NBP (R 61-62).

The total assets and liabilities transferred (R 598-601) included credit balances being held at Bank of China, New York Agency, for the Karachi branch in the amount of $546,123.20, and for the Chittagong subbranch in the amount of $96,252.18. Those sums had been "blocked" as assets of the PRC, first by "BOC" Taipei's own instructions in 1950, and then by this government under the Foreign Assets Control Regulations issued pursuant to the Trading with the Enemy Act (50 U.S.C. App. Section 1).

"BOC" Taipei had been formed by only two of the then twelve directors of BOC. Those two had fled to Formosa, had their authority revoked by BOC, and the Taipei opera-

tion became licensed in Taiwan only in 1960. In 1971, the Taiwanese legislature formed a new bank, ICBC (R 534-546). ICBC was thus a creation of statute and not a "name change" from BOC. At no time did the Karachi branch and Chittagong subbranch or NBP ever acknowledge any authority of "BOC" Taipei, or of ICBC, after its statutory creation. The said credit balances were at all times property of BOC Peking to which the said Karachi branch and Chittagong subbranch had expressed allegiance, and as such, BOC Peking could do whatever it chose with its property, as the lower Court correctly held. ICBC wants this Court to consider that the lower Court should have ruled that the PRC and BOC Peking could not do what it wanted with its assets, at least in New York.

ICBC, on page 4 of its petition, admits that the Regulations blocked "any transfer of assets in this country in which the PRC claimed an interest," but, the "FAC regulations aside", that ICBC always felt that the fund belonged to it. Here, again, is evidence of the lack of a serious argument. ICBC and its alleged predecessor, "BOC", New York Agency, blocked, and for thirty years reported the fund to the U.S. Treasury as property in which the PRC and/or its nationals had an interest, which constitutes a fatal admission by ICBC that the monies were indeed assets of the PRC or its national, mainly, BOC Peking. To allege that these assets were property of Taiwan, yet block them for three decades as PRC assets, defies reasonable explanation. Taiwan was never on an enemy list, and to block Taiwanese assets was illegal. The blocked funds were reported in sworn statements to the U.S. Treasury (R 74-79), and "BOC", New York Agency and ICBC never once in thirty years applied for a routine unblocking on the alleged basis that the property was an asset of Taiwan. There is no sensible reason why ICBC would block its own assets.

This is a simple case of conversion and confiscation of assets of a branch and subbranch and, thus, assets of the head office in Peking to which that branch and subbranch were loyal. BOC Peking certified that the fund is property of NBP by valid assignment (R 72), and, thus, an unbroken chain of title rests with NBP. Even if the assignment were voided, as ICBC recommends, that would merely mean that BOC Peking would have title to the fund. In no manner imaginable could title ever be placed with ICBC. The questions presented by ICBC cannot explain its and "BOC", New York Agency's own undeniable actions over thirty years duration, acknowledging the property as assets of the PRC or its national; nor can those questions alter this case into anything other than a straight-forward conversion action governed by state law.

REASONS FOR DENYING THE WRIT.

1. Jurisdiction should be refused as an adequate, independent state ground exists for the decision below

Notwithstanding NBP's denial of the validity of any of ICBC's alleged federal defenses, it is well settled that this Court will decline from review on certiorari if a non-federal ground is independent and adequate to support the judgment, despite the presence of federal grounds. *Fay v. Noia,* 83 S.Ct. 822, 372 U.S. 391, 9 L.Ed.2d 837 (1963); *Jankovich v. Indiana Toll Road Commission,* 85 S.Ct. 493, 379 U.S. 487, 13 L.Ed.2d 439 (1965). Jurisdiction to review on certiorari will be taken only if the federal ground was the *sole* basis for the decision. *Dept. of Mental Hygiene of California v. Kirchner,* 85 S.Ct. 871, 380 U.S. 194, 13 L.Ed.2d 753 (1965), *on remand,* 43 Cal. Rptr. 329, 400 P.2d 321 (1965).

This Court does not have to find conclusively that the decision was based on state grounds to decline jurisdiction. It may so refuse even where the question of the existence of an adequate state ground is debatable. *Stembridge v. Georgia,* 72 S.Ct. 834, 343 U.S. 541, 96 L.Ed. 1130. It may also refuse to take jurisdiction if a state Court's decision might have rested on a non-federal ground, for example, where no opinion was written by the last state appellate Court to review the matter, as in this case. *Ellis v. Dixon,* 75 S.Ct. 850, 349 U.S. 458, 99 L.Ed. 1231, *reh. den.* 76 S.Ct. 37, 350 U.S. 855, 100 L.Ed. 759.

The lower Court properly traced title to the funds from the said branch and subbranch to BOC Peking to NBP (Appendix to petition, "A"-11 to A-13). As that Court correctly held, "ICBC's contention that the BOC offices in Chittagong and Karachi should be treated as branches of BOC-Taipei is unsupportable" (A-12). Refusal to surrender the fund on demand, which was made as soon as the U.S. government blockage was lifted, constitutes a conversion. The substantive law of the State of New York governs that tort, and was the basis for the decision. The lower Court's discussion of ICBC's alleged federal defenses was not essential to the findings of fact and conclusions of law upon which the decision rested.

The decision could therefore have been rendered without deciding the alleged federal questions, which were not necessary for a determination. Jurisdiction should therefore be declined. *Wilson v. Cook,* 66 S.Ct. 663, 327 U.S. 474, 90 L.Ed. 793; *Harding v. Illinois,* 25 S.Ct. 176, 196 U.S. 78, 49 L.Ed. 394. The basis for the decision below is adequate and independent of any alleged federal grounds.

2. No substantial federal question has been presented

A federal question is not "substantial" if it is without merit or foundation, is wholly a matter of conjecture, rests upon false assumptions, is not debatable, or requires no analysis. *Ennis Waterworks v. Ennis,* 34 S.Ct. 767, 233 U.S. 652, 58 L.Ed. 1139; *Abrams v. Van Schaick,* 55 S.Ct. 135, 293 U.S. 188, 79 L.Ed. 278; *Parker v. McLain,* 35 S.Ct. 632, 237 U.S. 469, 59 L.Ed. 1051; *Hamilton v. Regents of University of California,* 55 S.Ct. 197, 293 U.S. 245, 79 L.Ed. 343, *reh. den.* 55 S.Ct. 345, 293 U.S. 633, 79 L.Ed. 717.

The lack of substance to ICBC's alleged federal questions is readily discernible. According to ICBC, the New York Court's decision, in a single sweep, nullified both the Taiwan Relations Act ("TRA") and the FAC Regulations, rejected federal law, interfered with Congressional powers, perverted the act of state doctrine, and challenged "all the business conducted, financial transactions had and judgments entered" for the three decades in which the PRC was not recognized (petition, pages 10-12).

Despite our numerous readings of the decision, we still fail to envision any of those consequences, and the Appellate Division and the Court of Appeals agreed.

Taiwan or any of its nationals are in no manner imaginable, harmed by the decision. No legal rights of any Taiwanese individual or entity have been infringed upon. No judgment in favor of Taiwan or its nationals and no financial transaction with any Taiwanese individual or corporation predating recognition of the PRC has in any way been upset or placed in jeopardy. ICBC states that the New York Court "rejected" the TRA, yet all that the TRA protects is the right to collect the 1953 judgment in *Bank of China v. Wells Fargo Bank & Union Trust,* 92 F.Supp. 920 (N.D. Cal.

1950), *appeal dismissed and remanded,* 190 F.2d 1010 (9th Cir. 1951), *on remand* 104 F.Supp. 59 (1952), *aff'd in part, rev'd in part,* 209 F.2d 467 (1953). The TRA does not compel a decision similar to *Wells Fargo* when dealing with other property not the subject of prior suits and claimed by other parties. Using ICBC's novel interpretation of the TRA, any Taiwanese national is automatically immune from all suits, and anyone having a claim against such national would be deprived of right without due process. The TRA was not intended to be a permanent bar against suing any Taiwanese entity for all time to come. The question of the effect of the TRA is a non-issue. The TRA in this case prevents a vacature of the *Wells Fargo* judgment and nothing more. That judgment was never challenged by the New York Court.

In *Wells Fargo,* no issue was fully litigated because BOC Peking was not a party. Although it tried to intervene, and its application reached the Ninth Circuit, it was denied standing in that suit to litigate its claim to the deposit in Wells Fargo Bank, since BOC Peking was a national of an enemy state, all of whose assets were frozen, and against whom the U.S. was at war in Korea. Despite ICBC's misinterpretation, legal entitlement to all property of BOC in the U.S., present and future, was not reached in *Wells Fargo,* nor could it have been reached as that decision applied only to the fund in suit (104 F.Supp. at 66). That Court based its decision, by its own words, solely on our Executive's recognition of Taiwan (104 F.Supp. at 66). It explicitly stated that by placing the fund in the "hands of the new management of the Bank of China, the 'People's Government' would be aided and abetted" (92 F.Supp. at 924).

Deciding in favor of BOC Peking would thus have resulted in aiding and abetting an enemy in wartime even if that enemy were legally entitled to the fund. Because of wartime conditions, national policy, and the fact that non-

recognized governments are generally not permitted to use our Courts, BOC Peking was denied standing.

Significantly, ICBC never used *Wells Fargo* to apply for unblocking of the subject fund, but now seeks to have that judgment given collateral estoppel effect, when that decision acknowledged political considerations in time of war, when BOC Peking was not a party and could not fully litigate its claim, when the said branch and subbranch of BOC were not parties, when NBP was not a party, when ICBC was not a party (nor even in existence until 1971), when the issues are anything but identical, and when law and circumstances have changed 180 degrees.

Guaranty Trust Co. of New York v. United States, 304 U.S. 126 (1938), relied on by ICBC, upholds the principle, never at issue here, that prior judgments remain valid notwithstanding a change in recognition status. The *Wells Fargo* judgment was not invalidated by the lower Court. It could not apply collateral estoppel treatment simply because the issues were not identical to those in this case (A 16) and not because of a "change in recognition policy," as ICBC asserts.

No conflict exists between the New York Court decision and *Guaranty Trust.* Likewise, no problem arises between the decision and *Kennett v. Chambers,* 55 U.S. 38 (1852), cited by ICBC, wherein the Court refused to enforce a contract designed to aid Texas in its war with Mexico. Although Texas had declared independence at the time the contract was entered into, our government did not recognize it and considered it still officially part of Mexico with which we were at peace. The Court was obliged to regard Texas as part of Mexico until the Executive determined otherwise. There is no conceivable conflict with the decision below.

The allegation that the decision "nullified" the FAC Regulations presents no valid federal question. The Regulations do not empower a judge to void a foreign agreement absent jurisdiction over the parties. It is elementary that a Court can issue orders only with respect to matters over which it has jurisdiction. Neither the PRC, the Government of Pakistan, BOC Peking, or NBP Karachi, the parties to the said various agreements, were persons subject to U.S. jurisdiction. Our government could temporarily block a transfer of funds in the U.S., but the foreign assignment itself was not subject to review in any Court. ICBC's case citations are not to the contrary. *Dames & Moore v. Regan et al.*, 453 U.S. 654 (1981), involved various regulations by which the Executive nullified liens on Iranian assets, and centered around the International Emergency Economic Powers Act, 50 U.S.C. Section 1701 *et seq.* Executive Orders Nos. 12170 and 12205, issued under 50 U.S.C. Section 1701 prohibiting certain transactions and activities, by their very terms apply only to "any person subject to the jurisdiction of the United States."

Likewise, *Propper v. Clark*, 337 U.S. 472 (1949), relied on by ICBC, concerned activities by persons subject to U.S. jurisdiction, including ASCAP, and plaintiff therein, as receiver.

In *Cheng Yih-Chun v. Federal Reserve Bank of New York*, 442 F.2d 460 (2d Cir. 1971), cited by ICBC, the transfer entered into by Cheng was done so through his capacity under a power of attorney to represent and handle his father's New York estate, and he was thus a person subject to U.S. jurisdiction, having utilized the New York Surrogate Court as well.

The decision below does not conflict with any of ICBC's authorities. The matter of jurisdiction over the parties is so

fundamental that ICBC's argument does not require debate or further analysis. ICBC wished the lower State Court to usurp powers unheard of by any Court in our history, and declare a foreign soverign-to-foreign sovereign agreement followed by a foreign bank-to-foreign bank agreement null and void, all in a vain attempt to escape the consequences of its own conversion of monies belonging to NBP.

No substantial federal question is posed with respect to the act of state doctrine, which the New York court correctly applied. The takeover of BOC's majority interest by the PRC, and the agreement between two sovereign nations, eventually resulting in the transfer of the Karachi branch and Chittagong subbranch of BOC, are acts of state beyond the consideration of a New York court. Whether the foreign agreement concerned, in part, property in the U.S. is irrelevant, as the agreement as a whole is outside of judicial review. Likewise, the Court cannot question the designation by the Government of Pakistan of NBP as the entity to succeed to the assets and liabilities of BOC's said branch and subbranch. Acts of a foreign sovereign, whether or not that government is recognized, cannot be questioned in these courts and are presumed to be valid. *United Bank v. Cosmic International Inc.*, 542 F.2d 868 (2d Cir. 1976); *Zweibon v. Mitchell*, 516 F.2d 594, 170 U.S. App. D.C. 1 (1975), *cert denied, Barrett v. Zweibon*, 96 S.Ct. 1684, 425 U.S. 944, 48 L.Ed.2d 187. ICBC is itself trying to negate the legitimate application of the doctrine so that a lower state court judge could review the merits of an agreement consummated between two foreign governments.

The decision does not conflict with ICBC's authority, *Bandes v. Harlow & Jones Inc.*, 852 F.2d 551 (2d Cir. 1988). That case involved acts of expropriation and confiscation which sought to be applied extraterritorially, and were "shocking to our sense of justice" (852 F.2d at 667). Here, no nationalization occurred upon the PRC's takeover

of BOC's majority interest, and the rights of private shareholders, as determined by the *Wells Fargo* Court, were not denied (104 F.Supp. at 65). At issue is an executed assignment pursuant to an agreement between two friendly foreign governments.

Finally, ICBC alleges that the decision allows enemies to evade the FAC Regulations by means of foreign assignment agreements. No such ruling or effect appears in the decision. Foreign sovereign states and nationals are free to and will enter into any transaction they wish, whether or not the decision below stands. ICBC wants the Court to prevent foreign governments from dealing with their own property in the U.S.

ICBC has presented no substantial federal question warranting consideration.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, New York
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Respectfully submitted,

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